

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CRAMMAN A. PARKER	:	DETERMINATION DTA NO. 818129
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Tax under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Period December 2, 1991 through December 1, 1997.	:	

Petitioner, Cramman A. Parker, 73 Fulton Street, Brentwood, New York 11717, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the period December 2, 1991 through December 1, 1997.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, Veterans Memorial Highway, Hauppauge, New York, on May 7, 2002 at 9:15 A.M., with all evidence to be submitted by September 13, 2002, which date began the three-month period for the issuance of this determination. Petitioner appeared by James Mazza, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jon Obert).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over the New York State and City income taxes withheld by Tri-Way Security & Escort Service of New Jersey from the wages paid to its employees and, if so, whether he willfully failed to perform

such duties thus becoming liable for a penalty equal in amount to the taxes not collected, truthfully accounted for and paid over.

FINDINGS OF FACT

1. Tri-Way Security & Escort Services of New Jersey, ID# B-22-32545210 (“Tri-Way of New Jersey”) was incorporated in the State of New Jersey on February 2, 1990. The Certificate of Incorporation indicated that the sole director of the corporation was Cramman A. Parker, 73 Fulton Street, Brentwood, New York 11717. The corporation filed a U.S. Corporation Short-Form Income Tax Return, Form 1120, for the year 1994 which stated its place of business to be 10127 217th Place, Queens Village, New York.

2. The Division of Taxation (“Division”) commenced its audit by attempting to match the wage and tax statements, Form W-2, filed by employees of Tri-Way of New Jersey with the withholding taxes reported and paid over by the corporation to the Division. The employees’ wage and tax statements contained the identification number of Tri-Way of New Jersey, B-22-32545210. The Division’s review revealed that Tri-Way of New Jersey had not filed withholding tax returns or paid over withholding taxes for the period at issue. The Division then contacted Tri-Way of New Jersey requesting information concerning its filing and payment of withholding taxes, but received no response. Subsequently, the Division obtained from the Internal Revenue Service the Employer’s Quarterly Federal Tax Returns, Form 941, of Tri-Way of New Jersey which are filed by employers who withhold income taxes from employee wages. Using the amount of wages reported by the corporation for each of its employees, the Division computed the amount of New York State and New York City withholding taxes that Tri-Way of New Jersey should have withheld and remitted to the Division.

3. On February 17, 2000, the Division issued 12 notices of deficiency to petitioner, Cramman A. Parker, asserting that he was “an officer/responsible person of Tri-Way Security & Escort Service of New Jersey” and, as such, was liable, pursuant to Tax Law § 685(g), “for a penalty in an amount equal to the tax not paid by the business. . . .” The notices assess New York State personal income tax of \$222,106.80 and New York City personal income tax of \$125,033.64.

SUMMARY OF PETITIONER’S POSITION

4. Initially, petitioner claimed that he was never an officer, responsible person or employee of TriWay of New Jersey, stating that he never signed checks, tax returns or acted in a managerial or fiduciary capacity on behalf of the corporation. He asserted that he was the president and sole shareholder of another corporation, Tri-Way Security & Escort Services, Inc., ID # 11-2593629, which was terminated in bankruptcy and is not involved in the present matter. After receiving a copy of the Certificate of Incorporation which indicated he was the sole director of Tri-Way of New Jersey, petitioner alleged that he was involved with the corporation, but had resigned his position prior to the period at issue.

CONCLUSIONS OF LAW

A. Determinations made by the Division in a notice of deficiency are presumed correct, and the burden of proof is upon petitioner to establish that those determinations are erroneous (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398). The burden does not rest with the Division to demonstrate the propriety of the deficiency (*Matter of Scarpulla v. State Tax Commission*, 120 AD2d 842, 502 NYS2d 113), and if there are any facts or reasonable inferences from the facts to support the

Division's determination, the assessment should be confirmed (*Matter of Levin v. Gallman*, 42 NY2d 32, 396 NYS2d 693).

B. Section 671(a)(1) of the Tax Law requires every employer maintaining an office or transacting business in the State and making payment of any taxable wages to deduct and withhold from such wages for each payroll period a tax in an amount substantially equal to the tax reasonably estimated to be due from the employee's New York adjusted gross income or New York source income received during the calendar year. Pursuant to section 674 of the Tax Law, every employer required to deduct and withhold tax shall file a withholding return and pay over to the Division the taxes required to be deducted and withheld. Section 675 of the Tax Law provides that every employer required to deduct and withhold tax is made liable for such tax, and any amount of tax actually deducted and withheld shall be held to be a special fund in trust for the tax commissioner.

C. The Division's calculation of tax due was supported by a reasonable factual basis, and no evidence was submitted by petitioner which refuted the deficiencies of tax due or which established that the withholding taxes had been paid. Therefore, the deficiencies of withholding taxes issued to Tri-Way of New Jersey are sustained.

D. Tax Law § 685(g) provides that a person responsible for the collection and payment of employee withholding taxes who willfully fails to do so is subject to personal liability in the form of a penalty for the amount of the unpaid taxes. Section 685(n) of the Tax Law defines a person required to collect such tax as "an individual, corporation or partnership or an officer or employee of any corporation . . . who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

The determination of whether an individual qualifies as a “person” is factual in nature and must be sustained if supported by substantial evidence (*Matter of Hopper v. Commr. of Taxation and Finance*, 224 AD2d 733, 637 NYS2d 494, *lv denied* 88 NY2d 1065, 651 NYS2d 409). The relevant factors to be considered include the following: whether the taxpayer signed or had the authority to sign tax returns, owned stock or served as an officer or employee of the corporation, derived a substantial portion of income from the company, possessed a financial interest in the company, possessed the right to hire and fire employees or had authority to pay the corporate obligations (*Matter of Capoccia v. New York State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476; *Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272; *Matter of Shah*, Tax Appeals Tribunal, February 25, 1999). The issue to be resolved in each case is “whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee” (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

In the present matter, petitioner was the sole director and involved with the corporation in a managerial and fiduciary capacity. His claim that he resigned from the corporation is not substantiated by the record in this matter. The facts support the conclusion that petitioner was a responsible person pursuant to Tax Law § 685(n). It is also noted that there were not any other corporate officers or directors during the years at issue (*see, Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536).

E. The Court of Appeals, in *Matter of Levin v. Gallman (supra)*, stated that the test in determining whether the actions of a responsible officer are “willful” under section 685(g) of the Tax Law:

is whether the act, default or conduct is consciously and voluntarily done with knowledge that as a result, trust fund monies belonging to the Government will

not be paid over but will be used for other purposes No showing of intent to deprive the Government of its money is necessary but only something more than accidental nonpayment is required.

It is further held that a failure to collect and pay over taxes can be willful notwithstanding the lack of actual knowledge, if the person recklessly disregarded his corporate responsibilities, including the responsibility to see that employment taxes are paid (*Matter of Capoccia v. State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301) and that “corporate officials . . . cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge” (*Matter of Risoli v. Commr.*, 237 AD2d 675, 654 NYS2d 218, quoting *Matter of Ragonesi v. State Tax Commn., supra*).

Lack of actual knowledge does not preclude a finding of willfulness if it is determined that one with a duty to act recklessly disregarded that duty (*Matter of Capoccia v. State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn., supra; Matter of Hussain*, Tax Appeals Tribunal, December 6, 1990). In the present matter, petitioner cannot “absolve himself merely by disregarding his duty and leaving it to someone else to discharge” (*Matter of Capoccia v. State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn., supra*). Petitioner had the authority and the opportunity to determine if the withholding taxes were being paid, but chose not to exercise this corporate authority, and is therefore determined to have willfully failed to remit the withholding taxes due from Tri-Way of New Jersey during the period at issue.

F. The petition of Cramman A. Parker is denied; and the notices of deficiency issued on February 17, 2000 are sustained.

DATED: Troy, New York
November 21, 2002

/s/ Thomas C. Sacca
PRESIDING OFFICER